

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

DAVID LOMASCOLA and RON BURCH

Plaintiffs,

v.

No. \_\_\_\_\_

BNSF RAILWAY COMPANY, KERRY LEE MCKEAN  
and VALERIE COOK,

Defendants.

**NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. § 1441(b) (DIVERSITY)**

Defendants BNSF Railway Company and its employee Kerry Lee McKean (collectively “BNSF”) submit this timely-filed Notice of Removal pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, and in support state as follows:

**I. BACKGROUND**

1. Plaintiffs filed their Complaint for Personal Injuries and Property Damage (“Complaint”) on November 14, 2011, in the Thirteenth Judicial District of the State of New Mexico, County of Valencia, Case No. D-1314-CV-2011-01423 (“State Court Action”). A copy of the Civil Docket Sheet and all process, pleadings, and orders served upon BNSF from Case No. D-1314-CV-2011-01423 is attached as Exhibit A. BNSF will comply with D.N.M.LR-Civ. 81.1(a) within the twenty-eight day period provided by that rule, to the extent Exhibit A does not accomplish that purpose.
2. BNSF was served with process on November 18, 2011.
3. This Court’s jurisdiction must be assessed by examining the complaint filed in the State Court Action on its face as of the time of filing this Notice of Removal. *See Pfeiffer v.*

*Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991) (“[T]he propriety of removal is judged on the complaint as it stands at the time of removal.”).

**II. THE PROPER PARTIES IN THIS ACTION ARE DIVERSE.**

1. Plaintiffs are residents of Oregon. Ex. A, Complaint ¶¶ 1, 2.
2. BNSF is a Delaware corporation, with its principal place of business in Texas and is thus a citizen of both Delaware and Texas for diversity purposes. 28 U.S.C. § 1332(c)(1).
3. Defendant Kerry Lee McKean is a resident of Texas. Ex. A, Complaint ¶ 3.
4. Defendant Valerie Cook is a resident of California. *Id.* ¶ 5.
5. There is complete diversity between Plaintiffs and Defendants. *See* 28 U.S.C. § 1441(a).

**III. THE AMOUNT IN CONTROVERSY EXCEEDS \$75,000**


1. In determining the amount in controversy, the Court should look to the “allegations of the complaint, or, where they are not dispositive, by the allegations of the notice of removal.” *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). “[A] defendant (like a plaintiff) is entitled to stay in federal court unless it is legally certain that less than \$75,000 is at stake.” *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008)(internal quotation marks & citation omitted). The Court may look to the substance and nature of the injuries and damages described in the pleadings. *See Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882-83 (5th Cir. 2000). In this type of personal injury case involving claimed damages for great physical and mental pain and suffering, future pain and suffering, severe permanent injuries, loss of enjoyment of life, medical expenses, future medical expenses, lost earning capacity, and property damages, the amount in controversy based on the facts of the Complaint well exceeds \$75,000. *See* Ex. A, Complaint ¶¶ 25, 26.

2. Given the complete diversity of the parties and an amount in controversy in excess of \$75,000, this Court has jurisdiction over the causes of action and claims asserted in the State Court Action pursuant to 28 U.S.C. § 1332, and this action is properly removable pursuant to 28 U.S.C. § 1441.
3. This Notice of Removal is timely filed under 28 U.S.C. § 1446(b) “within thirty days after the service of summons” upon BNSF.
4. All the above-named defendants have been contacted and have consented to the requested removal of this matter.
5. A copy of this Notice of Removal is being filed with the Clerk of the Thirteenth Judicial District of the State of New Mexico, County of Valencia.
6. BNSF respectfully demands that the trial of this matter in federal court be heard by a full jury.

WHEREFORE, BNSF requests that the action now pending in the Thirteenth Judicial District of the State of New Mexico, County of Valencia, as Case No. D-1314-CV-2011-01423, be removed from that state court to this United States District Court, as well as any other relief for BNSF the Court finds just and warranted.

Respectfully submitted,

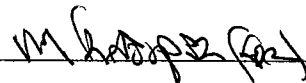
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By:   
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I hereby certify that on December 15, 2011, a copy of the foregoing was mailed to the following counsel of record:

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Tyler M. Cuff